IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

MONTOYA V. TYSON FOODS

GLORIA MONTOYA, APPELLEE,
V.
TYSON FOODS, INCORPORATED, APPELLANT.

Filed April 17, 2012. No. A-11-624.

Appeal from the Workers' Compensation Court. Affirmed.

Douglas L. Phillips, of Klass Law Firm, L.L.P., for appellant.

Sean P. Rensch and Richard J. Rensch for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

MOORE, Judge.

INTRODUCTION

Tyson Foods, Incorporated (Tyson), appeals from the order of the three-judge panel of the Workers' Compensation Court which affirmed the trial judge's award of benefits to Gloria Montoya in her claim against Tyson. The compensation court was not clearly wrong in finding that Montoya was totally and permanently disabled. Thus, we affirm the award.

BACKGROUND

Montoya filed a petition in the workers' compensation court on October 12, 2007, alleging that on October 13, 2005, she sustained personal injury in an accident arising out of and in the course of her employment with Tyson. Specifically, Montoya alleged that she sustained right hand tendonitis culminating in bilateral carpal tunnel syndrome. Montoya sought an award of benefits for vocational rehabilitation, temporary and permanent disability payments, future medical treatment, penalties, and attorney fees. Trial was held on February 23, 2009.

Montoya was 51 years old at the time of trial. She grew up in El Salvador, came to the United States in 1981, and is a permanent resident of the United States. Montoya does not speak

English and has a second grade education. After coming to the United States, Montoya did various things to earn a living, including cleaning houses, sewing, and working in a warehouse. Montoya has lived in Nebraska since 1994, living first in Lexington and then Columbus, and has held various packing plant jobs for Tyson since moving to Nebraska. She began working at Tyson's plant in Madison, Nebraska, in 2004. At some point after beginning work at the Madison plant, Montoya began having trouble with pain and swelling in her wrists and arms. During that time, she was working on the line using a hook to flip pig bellies and also using a knife and a "whizzard" knife. Montoya's symptoms became bad enough that she sought medical treatment, and she was eventually referred to Dr. Richard Cimpl. We note that at some point, Montoya developed a sensitivity to pig blood, and that she is restricted from working in jobs that will expose her to significant amounts of pig blood.

Montoya was initially examined by Cimpl on January 17, 2006, for evaluation of symptoms related to her right shoulder and upper extremity. Cimpl noted that Montoya had a previous MRI of her spine in 2004, which showed a bulging disk but no need for surgery. Cimpl's impression was impingement tendonitis of the right shoulder, tendonitis of the forearms, and possible bilateral carpal tunnel syndrome. Cimpl gave Montoya a cortisone injection in her right shoulder, recommended EMG and nerve conduction studies of Montoya's upper extremities, refilled her prescription of anti-inflammatory medication, and recommended that Montoya continue with physical therapy and modified work activities that could include occasional grasping, pinching, and pulling activities. Montoya did not improve with conservative treatment, and on April 18, Cimpl advised Montoya to avoid repetitive grasping, knife handling, use of a "whizzard" knife, and use of a hook on a permanent basis. Montoya underwent right carpal tunnel release on July 3 and left carpal tunnel release on September 15.

After a followup visit on January 9, 2007, Cimpl wrote:

> She continues to have ongoing symptoms related to her upper extremities, really secondary to a chronic tendonitis of her forearms, wrists and hands. I had seen her a few months ago and had given her a cortisone injection for the medial epicondylitis of her left elbow. That is somewhat better. She now has similar symptoms on the right side. She complains of a cramping sensation in her arms, pain along the volar aspect of her arms. I think she is simply one of the individuals who works in the packing plant environment and is going to have ongoing frustrating problems with tendonitis.

Cimpl wrote further:

> I explained to her that this is one of those situations where she is simply going to have to learn to accept and live with her discomfort, tendonitis and pain, if she is going to continue to work in the packing plant environment. She is already on a very easy job and she [is] not require[d] to do repetitive grasping.

On February 6, 2007, Cimpl placed Montoya at maximum medical improvement (MMI) for her chronic tendonitis, carpal tunnel syndrome, and subsequent surgeries, but he noted that she continued to have symptoms related to a stenosing tenosynovitis, or trigger thumb, of her right hand and recommended surgery for this condition.

On March 1, 2007, Montoya underwent right trigger thumb release surgery. On March 9, Cimpl concluded that the previous permanent restrictions should remain in place. On March 27,

Cimpl placed Montoya at MMI for her thumb, released her to return to work with the previous restrictions, and dismissed her from his care, indicating that he would see her for followup as needed. Cimpl notified Tyson that Montoya had reached MMI and had no permanent impairment rating.

Mary Unger, the Tyson plant personnel manager, was notified on April 5, 2007, that Montoya had reached MMI. When an employee is at MMI, Unger evaluates the jobs that are open and looks for a full-duty position for the employee. In Montoya's case, there were no open jobs that fell within her restrictions when she initially reached MMI. When that happens, the employee is given 30 days' notice that he or she will need to start looking for an open position within the company, and this was done with Montoya. During the 30-day period, the employee is still allowed to work a light-duty job. Montoya missed 3 days of work for her surgeries, but she returned immediately to restricted duty work.

If the employee is unable to successfully find a full-duty position that meets his or her restrictions at the end of the 30-day period, the Tyson management team reevaluates the open positions. At that second meeting in this case, the management team identified the "skin picnics" position as being open and within Montoya's restrictions. Tyson then sent a job analysis summary of the position to Cimpl for review. Cimpl concluded that the "skin picnics" job was something that Montoya could safely perform. Montoya worked at this position for approximately 1 day in May 2007, but she was unable to do this job.

Because Tyson was not able to find a job Montoya could perform at the end of the 30-day period, she was placed on "bid-walk." Bid-walk means that the employee is given a leave of absence and provided with notice of all jobs that are open for bid. If the employee wants to bid on a job, the employee informs Tyson. If the job is within the employee's restrictions and the employee has enough seniority, the employee is awarded the position. Montoya was placed on bid-walk, and the process was explained to her using an interpreter. According to Unger, Montoya had no questions and appeared to understand. The record shows that on May 14, 2007, Montoya signed a leave of absence application. The form shows that Montoya was taking an unpaid leave of absence for the personal reason of bid-walk. Montoya claims that she did not understand at the time what bid-walk meant and that she was told she could not do the "skin picnics" job and would have to come back when Tyson had a different job available.

On October 30, 2007, Montoya won a bid for the "saddle loins" job. At the end of the first week of training, Montoya was 40-percent qualified for the position, meaning she could keep up with the speed of the line 40 percent of the time. By the end of the third week, Montoya was 90-percent qualified for the "saddle loins" job. Montoya did not progress beyond the 90-percent point, and in December 2007, after 5 weeks, she was disqualified from the position because she was not keeping up. According to Unger, this disqualification was not related to Montoya's work restrictions but due to her inability to work at a fast pace. Montoya signed a disqualification sheet for the "saddle loins" position on December 13 and went back on leave of absence on December 14. After Montoya was disqualified from the "saddle loins" position, she periodically contacted Tyson about open positions until her inquiries tapered off and eventually stopped. Montoya was removed from Tyson's payroll on January 7, 2009, because she had exceeded the maximum time for Tyson's leave of absence policy.

On January 11, 2008, Montoya returned to Cimpl with complaints of some soreness in her upper back and in her arms, but primarily along the volar surface of her forearms. Montoya's biggest complaint was stiffness, tightness, and swelling in her hands and forearms with overactivity. Cimpl wrote, "I think we are dealing with a similar problem with chronic tendonitis of her forearms. Her condition is really unchanged, and she is simply one of those individuals who, I don't think, can tolerate working in the packing plant environment."

After being laid off by Tyson, Montoya sought other employment and applied at Excel, the unemployment office, and several hotels for cleaning positions. She was unsuccessful until a temporary agency placed her in a seed corn plant where she worked from September 3 through October 8, 2008. Her position involved picking out the dirt, leaves, and damaged corn as it passed by her on a conveyor belt. Montoya is no longer performing this job because it was seasonal work only.

Questions were posed to Cimpl by Montoya's counsel in a letter dated February 18, 2008. In his response, dated March 10, 2008, Cimpl responded affirmatively to questions inquiring whether Montoya's repetitive work duties at Tyson culminated in a work injury in October 2005 and whether her work duties were a cause of the bilateral upper extremity symptoms for which Cimpl had been treating Montoya since January 2007. Another question asked whether Montoya was permanently restricted from working in the meatpacking industry and whether that was due in part to her symptoms that occurred as a result of her work at Tyson. Cimpl marked the blank line to indicate "yes" but clarified by writing in the comment section, "I have not permanently restricted [Montoya] from working in [a] pack[ing] plant but certainly have advised her to seek other lines of work as she does not tolerate this environment." In response to the question of whether he would suggest any other permanent restrictions, Cimpl stated that Montoya should avoid repetitive grasping work. He also opined that Montoya had sustained a 2-percent impairment to each arm as a result of her injuries.

Cimpl's deposition was taken on August 6, 2008. During his deposition, Cimpl was asked about the statement in his notes that Montoya is "one of those individuals who works in packing plants that is going to have frustrating problems with tendonitis." Cimpl clarified:

> I think there's certain individuals who get into a working position which may involve repetitive grasping on a chronic basis and over time they just continue to be symptomatic, they have chronic tend[o]nitis. In the packing plant industry, certain people get trigger fingers, forearm tend[o]nitis, epicondylitis to the elbows, carpal tunnel syndromes. Just the nature of the work, if you do this repetitively over time, it just continues to cause chronic problems and pain. . . . Well, . . . some individuals, not everybody but some individuals, their body can't tolerate them doing that particular job and they develop chronic tend[o]nitis problems.

Cimpl opined that Montoya would be able to perform packing plant positions if the job did not consist of repetitive grasping or pulling. Cimpl's opinion that Montoya sustained a 2-percent impairment rating to each arm is for her carpal tunnel syndrome, chronic tenosynovitis, and trigger thumb. Cimpl explained that the reason his permanent impairment rating opinion for Montoya changed in a later reevaluation was because Montoya continued to complain of chronic

pain and chronic tendonitis of her forearms and continued to have difficulty working within her permanent restrictions despite modification of work activities and conservative treatment.

On December 4, 2008, Steven L. Line, a physical therapist, performed a functional capacity evaluation (FCE) on Montoya. Line noted that Montoya's responses to the FCE were consistent with maximal effort. He found that Montoya could work in the medium physical demand level and could occasionally lift 30 pounds and frequently lift 20 pounds. Line also noted other limitations in the amount that Montoya could carry, push, and pull. She had significant limitations in elevated work, some limitations in forward bending, limitations on walking, some limitations on crouching, significant limitations kneeling and half-kneeling, and some limitations on use of a stepladder. Montoya was able to sit and stand with no limitation. She had a low rating with coordination and the use of her hands.

Line performed a jobsite assessment at Tyson on December 10, 2008. At the time of the jobsite assessment, Tyson had four jobs open and available allegedly within the restrictions provided by Cimpl: "skin picnics," "grade commodity bellies," skin hams, and "saddle loins." After his evaluation, Line concluded that Montoya could perform the "saddle loins" position when considering the results of the FCE. Line also opined that Montoya could perform the "grade commodity bellies" position when only considering Cimpl's restrictions.

Montoya testified at trial via an interpreter. Montoya testified that her upper extremities hurt a lot when performing the "saddle loins" job. According to Montoya, the job required her to "grasp things." Sometimes, the loins have to be flipped so that the fat side is up, and Montoya testified that this requires grasping and the use of the wrist. Montoya testified that the loins passed by on a belt at a variable speed and that when the belt went faster, more products passed by. According to Montoya, she had problems with products piling up and falling off the belt, which would require her to pick them back up and place them on the belt.

While living in Lexington, Montoya was treated for back pain, and she testified at trial that her back still bothers her on occasion. After her surgeries, Montoya continued to wear equipment to protect her wrists, elbows, and forearms because of the pain and swelling she experienced, which helped only slightly. Despite her ongoing pain, Montoya believed there were jobs at Tyson which she could perform based on her then-current physical state. She also stated her belief that she could still work in a packing plant and perform housecleaning duties. Montoya has not seen any physician for her injuries since she last saw Cimpl in January 2008 or taken any prescription medication since that time, although she was taking nonprescription ibuprofen at the time of trial.

Angela Wakeland, an industrial engineer employed by Tyson in its Madison plant, testified that she was aware of the restrictions imposed on Montoya by Cimpl. Wakeland believed there were multiple jobs existing at the Madison plant in 2006 and 2007 falling within those restrictions. Wakeland was the individual who selected the four jobs reviewed by Line. She selected the jobs based only on the restrictions of no knife, hook, or "whizzard" knife, and no excessive grasping. Although Wakeland believed there were other jobs that fit within Montoya's restrictions, she only selected jobs for Line's review that were open, that is, not being performed by other people at that particular time. Wakeland discussed the "grade commodity bellies" job, one of the jobs Wakeland believed Montoya could perform absent the additional restrictions from the FCE. With this job, the worker takes the belly that comes on a conveyor belt, and based

on its weight, either tosses it to a big box or lets it go on the conveyor. Wakeland testified that because of the shape of the bellies, the easiest way to move them is to place your arms underneath and lift. Wakeland stated employees are trained to pick up the product with their arms and that no excessive grasping is required. According to Wakeland, the line runs at the same speed and the same amount of product comes to the employee every day. Wakeland also discussed the "saddle loins" job, which involves pushing the loin into a position that is perpendicular to the direction of the conveyor belt travel. According to Wakeland, the job only requires contact of the worker's hand with the product and does not require an actual grasp of it. Wakeland agreed that if an employee was unable to keep up, the loins could pile up. She also agreed that the loins occasionally fall over onto the wrong side, which requires the worker to "contact" the loin in order to flip it. In addition to this testimony, the job descriptions and still photographs of the four jobs reviewed by Line as well as a videotape showing performance of the "skin picnics" and "saddle loins" jobs were received in evidence.

The trial judge of the compensation court entered an award on June 26, 2009. After a review of the evidence, the judge concluded that there were not any available jobs at Tyson that Montoya could perform physically. The judge noted Montoya's age, the fact that she does not speak English, her level of education, and the limitations in the use of her arms. The judge stated that Montoya also "has pre-existing conditions which are to be combined with the injuries suffered at [Tyson] in determining [her] loss of earning power." The judge cited the odd-lot doctrine and stated, "Considering [Montoya's] education abilities and her severe restrictions and limitations, it is found that no one except a sympathetic employer would hire her. [Montoya's] only real experience is 15 years in the meatpacking business and she really has nothing else to offer an employer." The judge concluded that Montoya was totally permanently disabled. The judge awarded temporary benefits for 3 days Montoya missed work for surgery; permanent benefits beginning on December 14, 2007; future medical care; and vocational rehabilitation services.

Tyson filed an application for review, alleging that the compensation court erred when it found that Montoya was totally permanently disabled and when it found that she had a preexisting condition which when combined with the scheduled member injuries would support a finding of permanent total disability.

On December 10, 2009, the review panel entered an order of remand on review. The panel remanded the case to the trial judge for further findings concerning the preexisting conditions referred to by the trial judge. A subsequent order was entered by the trial judge, a second application for review was filed by Tyson, and another order of remand was entered by the review panel. Again, this remand concerned the preexisting conditions and their impact on the finding of permanent disability. We need not set forth further detail of these proceedings since the issue of preexisting conditions is not assigned as error in this appeal. We note that in the second order dated March 23, 2010, the trial judge found that as a result of the injuries Montoya suffered while employed by Tyson, she now has a total loss of earning power.

The trial judge entered its third order on January 26, 2011. The judge reviewed several statements from Cimpl's medical records and deposition concerning Montoya's restrictions and the difficulties she experienced working in the packing plant environment. The judge then stated:

> Once [Montoya] was at [MMI], she had to find a job that she could physically do within her restrictions. One job was found and she was unable to do it, so she was laid off. [Montoya] has not returned to work. No jobs exist at [Tyson's] packing plant that [Montoya] could do with her educational background and physical restrictions because of pain and tendonitis. [Montoya] is not required to work in pain. No job she had was light enough that she was not in pain from tend[o]nitis.
>
> Dr. Cimpl recommended a different work environment and [Montoya] must find another place to work other than a packing plant.
>
> I have watched [Montoya] testify and I believe her complaints of pain which Dr. Cimpl diagnosed as chronic tend[o]nitis. I believed her when she testified she was unable to do the work.
>
> With regards to another place to work, [Montoya] was almost 52 years old at the time of trial. She is unable to read, write, or speak the English language. She finished the second grade in San Salvador. The only jobs she can do are manual labor type jobs that require the use of her arms and hands of which use is restricted.
>
> [Montoya] had few, if any, skills left to sell to a potential employer and none other than a sympathetic employer would hire her. [Montoya] is totally disabled.

The judge then stated that there was no change in the previously entered awards.

On February 4, 2011, Tyson filed a third application for review, alleging that the compensation court erred when it found in its June 2009 award that Montoya was totally permanently disabled, when it found in its award of March 2010 that Montoya had sustained a total loss of earning power, when it found Montoya was totally disabled and declined to change its prior awards in January 2011, and when in all three awards it found that Montoya had permanent preexisting conditions, which, when combined with the scheduled member injuries, would support a finding of permanent total disability and total loss of earning power.

On June 22, 2011, the review panel entered an order of affirmance on review. In affirming the trial judge's award of January 2011, the panel concluded that the trial judge was not clearly wrong in finding there were no jobs Montoya could do at Tyson's plant. In addressing Tyson's argument that the trial judge failed to address Wakeland's testimony in his award, the panel reviewed the four jobs selected by Wakeland for consideration by Line in the FCE, which Wakeland indicated were the only open jobs at the time, stating:

> The skin picnics job and the skin hams job require [the worker] to take meat from a bin and place meat in a skinning machine, remove the meat and place it on a line. The review panel finds these jobs involve frequent grasping. The grade commodity bellies job as described requires the worker to toss or place each belly in a large box and the saddle loins job, according to [Montoya], requires that each piece of meat be grasped. If the loins pile up because [Montoya] is unable to keep up the pace, she must lift them.

Tyson subsequently perfected its appeal to this court.

ASSIGNMENTS OF ERROR

Tyson asserts, consolidated and restated, that the trial judge erred in finding that Montoya was totally and permanently disabled and that the review panel erred in affirming the award.

STANDARD OF REVIEW

Under Neb. Rev. Stat. § 48-185 (Supp. 2011), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009). On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Id.*

ANALYSIS

Tyson asserts that the compensation court erred in finding that Montoya was totally and permanently disabled and that the review panel erred in affirming this finding. Specifically, Tyson complains of the trial judge's finding that Montoya was totally and permanently disabled solely due to the jobs that were then presently available to Montoya in Tyson's business. Tyson also argues that there was not sufficient competent evidence to warrant the trial judge's findings that there were no jobs available at Tyson's business, that Montoya's treating physician recommended that Montoya must find another place to work other than a packing plant environment, that Montoya has not returned to work since leaving employment with Tyson, and that Montoya is only qualified to perform manual labor jobs that fall outside of her medical restrictions.

We first address Tyson's argument that it was error to find that Montoya was totally and permanently disabled solely due to the jobs that were presently available to her at Tyson, as opposed to jobs that fit within her limitations but were not presently open. However, Tyson did not raise this specific issue before the review panel in any of its three applications for review, nor was it addressed by the review panel. In reviewing decisions of the Workers' Compensation Court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal. *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007). Accordingly, we decline to consider Tyson's arguments about the labor market issue in connection with the trial judge's application of the odd-lot doctrine.

Under the odd-lot doctrine, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. *Lovelace v. City of Lincoln*, 283 Neb. 12, ___ N.W.2d ___ (2012). The essence of the test is the probable dependability with which a claimant can sell his or her services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his or her crippling handicaps. *Id.*

Whether a plaintiff is totally and permanently disabled is a question of fact. *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008); *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). When testing the trial judge's findings of fact, an appellate

court considers the evidence in the light most favorable to the successful party and gives the successful party the benefit of every inference reasonably deducible from the evidence. *Money, supra*. As the trier of fact, the trial judge determines the credibility of the witnesses and the weight to give their testimony. *Id.*

Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. *Frauendorfer, supra.* Total disability does not mean a state of absolute helplessness. *Money, supra*; *Frauendorfer, supra.* It means that because of an injury, (1) a worker cannot earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform or (2) the worker cannot earn wages for any other kind of work which a person of his or her mentality and attainments could do. *Id.*

Montoya was almost 52 years old at the time of trial. She does not speak English and has a second grade education. Her work experience is almost exclusive to the packing plant industry. After being dismissed from Tyson, Montoya continued to seek employment, but she succeeded in finding only one temporary and seasonal job in a seed corn plant. Montoya has ongoing pain and tendonitis; restrictions against the use of knives, hooks, and "whizzard" knives; and restrictions from repetitive grasping. There was conflicting evidence in the record about the amount of frequent repetitive grasping involved in certain jobs at Tyson. While Cimpl did not explicitly prohibit Montoya from continued work in the packing plant industry, it is clear when reviewing the record as a whole that he had significant and legitimate concerns about her ability to do so. Considering the evidence in the light most favorable to Montoya and giving her the benefit of every inference reasonably deducible from the evidence, we cannot say that the trial judge erred in finding Montoya totally and permanently disabled or that the review panel erred in affirming this finding.

CONCLUSION

The compensation court did not err in finding Montoya totally permanently disabled.

AFFIRMED.